

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

NO. 76-4138

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL UNION NO. 814, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT,

Local Union No. 814, International Brotherhood of Teamsters
Chauffeurs, Warehousemen and Helpers of America

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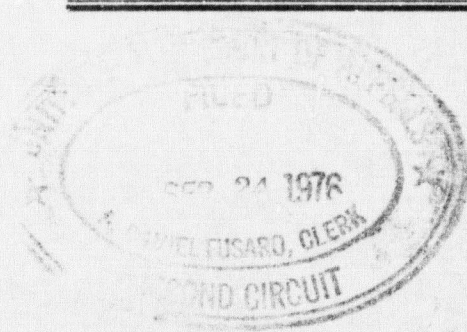


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Respondent,

On Application for Enforcement of An Order of
The National Labor Relations Board

BRIEF FOR RESPONDENT,
Local Union No. 814, International Brotherhood
of Teamsters, Chauffeurs, Warehousemen and
Helpers of America

ISSUES PRESENTED

Whether the Board abused its discretion in failing to apply its established accretion standards by finding that Local 814 misapplied its multi-location collective bargaining agreement to employees at the Company's newly-acquired White Plains facility where (a) all the Board's criteria for finding an accretion were met and (b) where the agreement contained an accretion clause, a standard union-security clause, and a

jurisdictional dispute procedure which had been utilized and agreed to by all the parties involved.

Whether the Board should have deferred to the arbitration award under the unique circumstances of this case.

If the Board's determination is enforced, whether the reimbursement order should be vacated in view of the Union's good faith extension of its collective bargaining agreement.

COUNTER STATEMENT OF THE CASE

Preliminary Statement

This case seeks to enforce an order of the National Labor Relations Board (the "Board") against Respondent Local 814, International Brotherhood of Teamsters ("Local 814") for having extended its collective bargaining agreement with the employer, Morgan and Brother-Manhattan Inc. ("Morgan" or the "Company"), to Morgan's newly-acquired moving and storage facility in White Plains. The Board found that Local 814 thereby violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, 29 USC §151 et seq. (the "Act"). Local 814 denies that the Act was violated because, under accepted Board accretion standards, the collective bargaining agreement was properly extended to cover the employees at the White Plains facility.

Contrary to the Board's erroneous characterization of the issue in its brief, this case does not involve the question

of whether the White Plains facility is a separate unit for representation purposes under Section 9(b) of the Act. Nor does the case involve a violation of the employees' Section 7 rights since the White Plains employees had been previously represented by a sister Teamster Local and the jurisdictional dispute was peacefully resolved through internal union procedures prior to Local 814's extension of its collective bargaining agreement.*

Rather, the main question for review is whether the Board's policy of treating certain groups of employees as accretions to an existing bargaining unit is applicable to the facts and circumstances of this case. Where the Board's accretion criteria are met, the courts have given full recognition to a valid extension of a collective-bargaining agreement, including its union-security provision.

The Board's petition for enforcement can also be characterized as an another attempt to obtain a rubber stamp endorsement of an order from the federal Courts, under the guise of its supposed expertise in the area of unit determinations, on the grounds that the Act confers such broad discretionary powers that the courts virtually have no choice. However, neither the Board's oft-repeated litany concerning the narrow scope of judicial review, nor the Act itself, mandates that the courts abrogate their responsibility to strictly scrutinize case-by-case determinations.

*The relevant portions of Sections 7, 8(b)(1)(A), 8(b)(2), and 9(b) are set out in the appendix to this brief.

Where, as here, a Board's determination is not supported by the weight of the evidence and where, as here, the Board has failed to apply established accretion precedent, the Board's order is not entitled to enforcement. As will be demonstrated more fully below, the Board's order is arbitrary and capricious and enforcement should be denied.

Proceedings Below

This case represents an extraordinary waste of time, effort and expense by the Board and the parties involved. The Regional Director refused to consent to a withdrawal of the unfair labor practice charge by the charging party. The Administrative Law Judge refused to defer to a final and binding arbitration award in favor of Local 814, and ignored the internal union resolution of the underlying jurisdictional dispute between two sister Teamster locals to which the Employer had agreed to be bound. Subsequent to the uncontested intraunion transfer of the employees from Teamster Local 445 to Respondent Teamster Local 814, pursuant to the aforesaid arbitration award and jurisdictional dispute resolution, the employees involved continued to perform the same moving and storage work for the successor employer, under virtually identical terms and conditions of employment as they had enjoyed before the transfer.

On April 12, 1975, the Administrative Law Judge heard and determined the merits of the accretion claims. Testimony*

*E.P. Sadler Morgan, President of the Company, was the only witness. His testimony was undisputed and entitled to full credence by the Administrative Law Judge and the Board.

established (1) centralization of managerial and administrative control (A. 28, 55, 56, 73)*; (2) geographic proximity (A. 25); (3) similarity of working conditions, skills, wages, and functions (A. 25, 26, 69); (4) complete centralized control of labor relations (A. 32, 33, 56, 57, 64, 72, 73); (5) history of multi-location collective bargaining between Local 814 and Morgan (A. 16); (6) frequent, common interchange of employees (A. 23, 25, 35, 59, 60, 68, 71). Nonetheless, the Administrative Law Judge found that no accretion occurred, concluding that the Union violated the Act (A. 99).

The Board's Decision and Order of March 31, 1976, 223 NLRB No. 71, merely affirmed in toto the rulings, findings and conclusions of the Administrative Law Judge, adopting in full his recommended order which included reimbursement of fees and dues paid to Local 814 by the employees at White Plains (A. 103-104).

Statement of Facts

A. History of Collective Bargaining Between Local 814 and Morgan.

Morgan is a centrally organized, integrated and controlled moving and storage company (A. 28, 55, 56, 73).

In New York City and that portion of the New York Metropolitan area covered by its New York State Tariff (A. 54) Morgan operated (prior to its acquisition of the J. H. Evans

*"A" references are to pages in the joint appendix.

White Plains location herein at issue) six locations in the metropolitan New York area (five in New York City and one in Armonk) under contract with Local 814, covering approximately 100 moving and storage employees (A. 16, 17), and a small facility in Rye where three employees have been under a separate contract between Morgan and Local 445 since 1972. In addition, Morgan has a contract with Local 191, IBT representing long-distance operators and employees at its Greenwich Connecticut location* and at its long-distance terminal at the Armonk location.

Since the mid-1920's Morgan has had successive collective bargaining agreements with Local 814 covering its New York area employees.** All employees in the 814 unit are local drivers, packers, helpers, warehousemen and checkers.

*The Connecticut operation, while administratively controlled from Morgan's Manhattan-based central location, is covered by a separate Connecticut Tariff (A. 54-55), and separate profit and loss figures are maintained for that location (A. 65). The Connecticut location - Local 191 contract is not similar to the 814 contract (A. 69).

**The current agreement, effective April 1, 1974, for a term of three years, has been in effect at all times material to this case (A. 94).

B. Acquisition and Merger of J. H. Evans-White Plains Into Morgan.

In June, 1974, Morgan purchased certain of the assets of J. H. Evans, a moving and storage company in White Plains, merged it into the overall Morgan operation (A. 40), and continued the employment of Evans' employees. Prior to Morgan's acquisition of this facility, the White Plains employees were a unit of moving and storage employees represented by Teamster Local 445. As a Local 445 unit, these employees possessed the same skills and performed the same moving and storage work as the employees in the Morgan-Local 814 multi-location unit.

After the acquisition, the White Plains operation was functionally integrated into the general Morgan operation, having no autonomy whatsoever, performing exactly the same functions, interchangeably, with the other Morgan - Local 814 moving and storage facilities in the Metropolitan New York area.*

C. Extension of the Local 814 Collective Bargaining Agreement to the White Plains Facility.

The collective bargaining agreement between Morgan and Local 814 contains a clear and unequivocal Acquisition and Union Jurisdiction Clause, Paragraph 51(a), which states, in

*Details of the complete functional integration of the White Plains facility, including its labor relations, are set forth in connection with applicable accretion standards, Point IB, infra.

pertinent part, that the agreement shall cover any after-acquired moving and storage business "and the employees shall be considered an accretion to the collective bargaining unit covered by the applicable local". Pursuant to this clause, Local 814 notified Morgan it considered the former Evans employees to be part of the Local 814 collective bargaining unit based upon specific accretion facts present as a result of the acquisition (A. 77).*

At the same time that Local 814 made its demand upon Morgan, Local 445 asserted its intention to retain jurisdiction over the Evans employees despite the merger with Morgan (A. 78). Faced with this jurisdictional conflict between the two Teamster Locals, Morgan resisted Local 814's claim, suggesting that "the resolution of the dispute is best done between the two locals and the employees involved" (A. 79). Local 445 and Local 814 agreed to submit the question of jurisdiction over the former Evans employees to Teamster Joint Council No. 16, pursuant to the jurisdictional dispute provisions of the Constitution of the parent union, International Brotherhood of Teamsters, Article XII, Section 13. A hearing was held and a decision rendered by Joint Council No. 16 in favor of Local 814 on September 6, 1974 (A. 82).**

*Paragraph 51(A) is set forth in full at A.85. The factors listed by Local 814 were admitted to be true at the hearing (A. 40-43).

**Local 445 did not dispute the directive of the Joint Council No. 16, and agreed to arrange for an "orderly transfer" of the White Plains employees to the jurisdiction of Local 814 effective January 1, 1975 (A. 84). Local 445 was not the charging party in this case.

After Morgan agreed to be bound by the determination of Teamster Joint Council No. 16 (A. 42-43, 83), Local 814 informed the White Plains employees that their Teamster representation had been transferred from Local 445 to Local 814 and therefore the Local 814 contract, including its union-security provisions, would henceforth become applicable to them.*

Despite these events, Morgan balked at applying the Local 814 contract to the White Plains employees. This dispute was submitted to and heard by the duly constituted arbitration panel established by the Local 814 - Morgan contract, (the Moving and Storage Joint Labor Management Board) on December 5, 1974 (A. 51). Local 814 and Morgan both attended the Board hearing, and submitted evidence concerning all the issues surrounding Local 814's extension of its contract to the White Plains employees (A. 51-53). The determination of the arbitration panel in favor of Local 814 (A. 90-91) was accepted by Morgan as final and binding under the collective bargaining agreement (A. 53).

*Such notification by Local 814 was not a warning as suggested by the Board (Brief, p. 5). The 31-day union-security clause is permitted under the Act and as such is legally binding upon the Morgan employees. Moreover, the employees were advised that they were entitled to a transfer card from one local to another under the Constitution of the International. It is the Union's duty to advise employees of their rights, duties and obligations under the contract. Any finding that such notification constituted a "warning" or coercion is an improper inference not based upon the facts.

The Joint Board based its decision on the following factors:

"In addition to Article 51(A)(1) of the Collective Labor Agreement this desicion (sic) is based upon Local 814 (sic) letter to Morgan dated June 7, 1974 and Morgan's letter to Local 814 dated June 11, 1974 and the facts related therein; the decision of Teamsters Joint Counsel No. 16 dated September 6, 1974 and the Joint Board's independent evaluation of the facts and evidence presented at the hearing".
(A. 91; A. 95)*

*Following this decision rendered by the Arbitration Board, on March 14, 1975, the individual charging party, an employee of Morgan at White Plains, wrote to the Regional office attempting to withdraw the charges against Local 814 (A. 48). However, the Regional Director did not approve or consent to this withdrawal.

ARGUMENT

THE BOARD ERRED IN FINDING THAT
THE WHITE PLAINS EMPLOYEES ARE NOT
AN ACCRETION TO THE EXISTING LOCAL
814 COLLECTIVE BARGAINING UNIT.

A. Introduction

Congress has imposed upon the Board in Section 9(b) of the Act, the duty to determine whether a unit of employees is appropriate for purposes of collective bargaining. We agree, as indeed we must, that "the Board has broad discretion to determine the scope of appropriate units for collective bargaining" (Board brief, p. 9).

But contrary to the Board's view of this case, the resolution of the accretion question presented herein does not rest solely on this general principle.* Nor does this statement immunize the Board from strict judicial scrutiny of its decision-making process.

Administrative discretion to make unit determinations is limited by the Act itself and by the doctrine of accretion which the Board has established in order to fashion an appropriate accommodation between the employees' Section 7 rights to select representatives

*The Second Circuit cases cited by the Board on p. 10 of its brief are inapposite since they only concern unit determinations not involving accretion considerations.

of their own choosing and the stability and industrial peace fostered by the voluntary collective bargaining process which the Act also encourages, 29 U.S.C. §151. Sheraton-Kauai Corporation v. NLRB, 429 F.2d 1352, 1355 (9th Cir. 1970); NLRB v. Appleton Electric Co., 296 F.2d 202, 206 (7th Cir. 1961).

Out of this accommodation, which the Courts have fully recognized*, the Board has developed a set of rules which it applies (and Courts enforce where appropriate) whenever there has been a merger, consolidation, acquisition or expansion of an employer's business resulting in a question concerning whether a group of employees can be treated as an "accretion" to an existing bargaining unit or whether an election must be held. If an accretion is found, the Board does not require a separate election, permitting these employees automatically to become members of the existing unit and to be covered by the union-security provisions of the collective bargaining agreement.

The Board argues this case as though it were a representation case designed to determine the prospective rights and obligations of a new group of employees. This is simply not the issue. NLRB v. Appleton Electric Co., supra, 296 F.2d at 206.

*See e.g., Spartan Industries Inc. v. NLRB, 406 F.2d 1002, 1005 (5th Cir. 1969); NLRB v. Food Employers Council Inc., 399 F.2d 501, 502-503 (9th Cir. 1968); NLRB v. Baton Rouge Waterworks Co., 417 F.2d 1065 (5th Cir. 1969).

The question here is whether a union with a history of multi-location collective bargaining with the acquiring employer can validly extend its agreement containing an acquisition and jurisdiction clause to accrete employees, who were previously represented by a sister local, through the mechanisms provided for in the agreement, where all the Board's accretion standards were substantially present.

The Board's attempt to make illegal Local 814's inclusion of these employees under the unique circumstances in this case does violence to the basic policy of the Act which seeks to insure stability in collective bargaining relations. Moreover, the Board's attempt to undermine the union-security clause in the agreement simply will not square with Section 8(a)(3) of the Act which expressly make identical union-security clauses lawful.

Further, the Board, under the guise of its broad discretionary powers to choose "an appropriate unit", attempts to foreshorten, indeed foreclose, meaningful judicial review of its erroneous determination by its dramatic pronouncement that the burden of proof on the union urging accretion is virtually insurmountable (Board's brief, p. 10). Contrary to the Board's assertion, a determination of accretion does not depend upon a finding that "the larger unit alone is appropriate" but rather upon a finding that, after weighing the competing considerations and factors against established accretion criteria, a larger unit

is on balance an appropriate unit. See e.g., NLRB v. Sunset House, 415 F.2d 545, 549 (9th Cir. 1969); NLRB v. Food Employers Council Inc., supra, 399 F.2d at 504.

Most important, the consideration here is not whether the Union can prove the larger unit is the only appropriate unit (a test not required by the Courts or prior Board decisions), but whether the union can establish that the Board abused its discretion by failing to follow its established accretion criteria and by largely ignoring the substantial evidence supporting a finding of accretion in this case.

Thus, contrary to the Board's attempt to immunize itself from judicial review, the Board's accretion determination must nonetheless be supported by substantial evidence on the whole record and enforcement must be denied if its conclusions are arbitrary and capricious, 29 U.S.C. §160; Westinghouse Electric Corp. v. NLRB, 506 F.2d 668 (4th Cir. 1974); NLRB v. Baton Rouge Waterworks Co., supra; NLRB v. Appleton Electric Co., supra.

The principles governing judicial review of Board findings have been further defined by the Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). There the Court emphatically stated that the duty of the reviewing court is not merely to be a "judicial echo" of the Board's conclusions. Rather, the court must scrutinize the record

as a whole to satisfy itself that the Board's order rests on adequate proof. The Court admonished:

"Reviewing Courts ... are not to abdicate their conventional judicial function. Congress has imposed on [the Courts] the responsibility for assuring that the Board keeps within reasonable bounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole ... The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgement on matters within its special competence or both".
340 U.S. at 466.

This Circuit has applied the "mood" set by the Supreme Court in Universal Camera when reviewing Board decisions and has denied enforcement of Board orders where it cannot in good conscience find that the evidence supporting the decision is substantial. Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 452-453 (2nd Cir. 1975) (Friendly, J.); NLRB v. Marcus Trucking Co., 286 F. 2d 583, 589 (2nd Cir. 1961) (Friendly, J.); NLRB v. Bausch and Lomb, Inc., 526 F.2d 817, 829 (2nd Cir. 1975) (Friendly concurring and dissenting); cf. NLRB v. Columbia University, __ F.2d __, 93 LRRM 2085 (2nd Cir. 1976).

In addition, Courts have resisted enforcement of an order where the Board's decision-making process arbitrarily flies in the face of established Board precedent. NLRB v. Appleton Electric Co., supra; see also, NLRB v. Food Employer Council, supra, 399 F.2d at 505; compare, NLRB v. International Longshoremen's and Warehousemen's Union, Local 50, 504 F.2d 1209 (9th Cir. 1974), cert. den., 420 U.S. 973 (1974) (Section 10(k) work dispute determination).

When the case at bar is scrutinized within these parameters, it becomes readily apparent that the Board has overstepped the boundaries of its discretion.

B. The Board's Findings are not Supported by Substantial Evidence nor by Applicable Accretion Precedents.

The Board's determination that no accretion occurred is based on findings of fact unsupported by the evidence of record. Further, the Board failed to accord proper weight to the relevant factors favoring accretion under established precedents.

In The Great Atlantic & Pacific Tea Co., 140 NLRB 1011, 1021 (1963), the Board stated:

"In determining that a newly established facility or operation is an accretion to an existing unit, the Board has given weight to a variety of factors, such as integration of the operations; centralization of managerial and administrative control; geographic proximity; similarity of working conditions, skills and functions; common control over labor relations; collective-bargaining history; and interchangeability of employees. Obviously, cases in which all of these, or only these, positive accretion factors are present are rare. For, the normal situation presents a variety of elements, some militating toward and some against accretion, so that a balancing of factors is necessary. In addition, in some cases the Board gives greater weight to some factors than to others and, indeed, the presence or absence of a particular factor may be crucial." (citations omitted)(emphasis added).

Whether or not a particular operation constitutes an accretion or a separate unit turns "on the entire congeries of facts in each case".* Id. The Board and the Courts have generally followed these standards, despite this case-by-case approach, holding that where the weight of relevant factors substantially favors accretion, notwithstanding some evidence of countervailing factors, the larger unit will be permitted. See, e.g., Safeway Stores, Inc., 137 NLRB 1741 (1962); NLRB v. Appleton Electric Co., supra; NLRB v. Frisch's Big Boy Ill-Mar, Inc., 356 F.2d 895 (7th Cir. 1966); NLRB v. Purity Food Stores, Inc., 376 F.2d 497 (1st Cir. 1967).

*"That truth does not, however, preclude the need for rational and reasonably consistent assessments of such factual situations...It is not clear that in deciding such cases the Board has been entirely consistent." NLRB v. Food Employers Council, Inc., supra, 399 F.2d at 504-505.

For comparable criticism of the Board's case-by-case approach in work-assignment disputes, see NLRB v. Teamsters Local 584, 535 F.2d 205 (2nd Cir. 1976).

1. Extension of a multi-location collective bargaining agreement containing an accretion clause.

(a) Legal precedent

In analyzing the relevant collective bargaining history in multi-location accretion cases, the Board looks to the Employer's history of collective bargaining with the union asserting the accretion claim to determine whether the parties have extended their contract to cover new or after - acquired locations within the existing unit. Where there is such a history, other positive factors being present, a separate unit has often been held inappropriate. See e.g., Hudson Pulp and Paper Corp., Tissue Division, 117 NLRB 416 (1957); Molina Mills, 115 NLRB 1285 (1956); The Great Atlantic & Pacific Tea Co., supra, 140 NLRB at 1021.

Where there is an accretion clause in the collective bargaining agreement, the Board also balances the conflicting policies of stability in bargaining relations, NLRB v. Appleton Electric Co., supra, with preserving the employees' right to choose their own bargaining agents, NLRB v. Masters-Lake Success, Inc., 287 F.2d 35, 36 (2nd Cir. 1961). Thus, where there has been no history of collective bargaining at the acquired plant, or where the employees have never been represented, have rejected representation or have been previously excluded from the bargaining unit, the Board has found the new group's Section 7 rights determinative. R.P. Sherer Corp., Hypospray Division, 95 NLRB 1426 (1951); Hershey Foods Corp., 208 NLRB 452, 458 (1974) (union representation rejected on two prior occasions); NLRB v. Masters-Lake Success, supra,

(new hires); Sheraton-Kauai Corp. v. NLRB, supra, (new hires); NLRB v. Horn & Hardart, 439 F.2d 674, 682 (2nd Cir. 1971) (cashiers systematically excluded from the union cannot now be accreted where there is no evidence that the contract was intended to cover them).

In contrast, the Board and the Courts have recognized and accorded controlling weight to collective bargaining agreements with accretion clauses where the Section 7 rights of employees will essentially remain assured. Retail Clerk's Union, Local 870, 192 NLRB No. 33; NLRB v. Appleton Electric Co., supra.

(b) Board's erroneous findings and conclusions

1. The Board found that Morgan historically has three separate but identical bargaining units and accorded great weight to that fact (Board's brief, p. 3).

The Board simply ignored the evidence establishing that historically the Local 814 contract has been extended to cover virtually all Morgan moving and storage locations in the New York and Westchester geographic area since the mid-1920's.

There was no evidence offered at the hearing below as to the precise manner by which this agreement came to cover each of the Morgan facilities or whether they were acquired in the same manner as the White Plains facility, therefore it may reasonably be inferred that as each location became a part of the Morgan operation, the 814 contract was extended to each

automatically. The Rye location is the only exception. Evidence further established that the Greenwich location differs in many significant functional respects from the other Morgan facilities and is essentially a long-distance operation.

Evidence also established that the Local 814 employees constituted the largest unit, having over 100 employees on its Company seniority list (A. 70). The Local 814 unit is comprised of employees doing the same work under the same terms and conditions of employment at all Morgan's local moving and storage locations with the exception of Rye where the three employees are covered by the Local 445 agreement which is virtually identical to the Local 814 agreement (A. 69).

In contrast, the Local 191 contracts at Greenwich and at the long-distance terminal at Armonk basically cover the approximately 38 long-distance truck operators. The Local 191 Morgan contract contains different terms and conditions of employment (A. 17, 70).

2. The Board accorded great weight to the fact that the White Plains unit had been separate prior to its acquisition by Morgan (Board brief, p. 11).

The Board accorded no weight to the substantial and undisputed evidence that the White Plains employees, both before and after the acquisition performed exactly the same tasks as the employees covered by the Local 814 contract. Further, the Board gave little consideration to the fact that the White Plains employees had previously selected and were represented by a similar Teamster Local 445.

Thus, the only "representation" issue present at the time of the acquisition was which Local had jurisdiction over these employees. There was undisputed evidence that the two sister locals had peacefully and properly resolved the intra-union jurisdictional question in favor of Local 814 prior to Local 814's extension of its contract. Local 445 did not appeal the decision, agreed to an orderly transfer, and is not a rival union in this case.

Contrary to the Board's analysis, this is not a case involving a newly hired unit's representation rights, nor a case where the after-acquired employees had formerly been unrepresented or had rejected unionization on prior occasions. Coupled with the undisputed evidence that the valid accretion clause in the contract was expressly applicable, the significance which the Board attached to the separateness of the White Plains employees prior to the acquisition is erroneous.

2. Centralization of Managerial and Administrative Control.

(a) Legal Precedents

Centralized management and integrated functioning of a multi-location business are evidenced by central coordination of administration with a minimum of local independent control. NLRB v. Sunset House, *supra*, 415 F.2d at 547; NLRB v. Appleton Electric Co., *supra*, 296 F.2d at 205. As the Court recognized in NLRB v. Baton Rouge Waterworks, *supra*, 417 F.2d at 1067, where the company's business policies - and labor policies - "are determined by the same people at the top and come out with the same results at the bottom", the Company is functionally integrated. Thus, some minimal local autonomy or immediate separate supervision in such cases has not been held determinative. Hudson Pulp and Paper Co., Tissue Division, *supra*; NLRB v. Purity Food Stores, *supra*, 376 F.2d at 501, NLRB v. Frisch's Big Boy Ill-Mar, Inc., *supra*, 356 F.2d at 897.

Where the Board has isolated one unit in a highly centralized and integrated operation, the Courts have refused to enforce the Board's order. See, e.g., NLRB v. Frisch's Big Boy Ill-Mar, Inc., *supra*; NLRB v. Purity Food Stores, Inc., *supra*.

(b) Board's Erroneous Findings and Conclusions

The Board incorrectly relied on a finding of "separate supervision" and "local autonomy" despite overwhelming evidence

that Morgan is a highly unified and centrally controlled company with all administrative functions performed by its administrative office in Manhattan (A. 42). This office controls all accounting, billing, bookkeeping, purchasing, payroll*, personnel records, and advertising for all the Morgan branches (A. 28). Further, Mr. Morgan testified that the White Plains operation was "melded" into the general Morgan operation: there is one Morgan letterhead and billhead (A. 55); telephones are all answered "Morgan and Brother" (A. 55): there is one set of Morgan trucks; (A. 56, 65) one profit and loss statement (A. 65) and there are no separate sales forces based in the branches (A. 64). Thus, all the Morgan facilities perform essentially the same moving and storage operation, with the exception of the long-distance operations in Greenwich and Armonk.**

*The Board erroneously states that "each facility prepares its own payroll records" (Board, brief, p. 6). Mr. Morgan testified that the payroll is kept by a computer at the 80th Street operation and all payroll functions are handled by the administrative office (A. 31). Moreover, the main payroll records for Morgan facilities are kept in the central office, including personnel records. Only "ancillary records are kept at the branch because the Department of Labor requires it" (A. 28).

**As noted above, there is a separate profit and loss statement for Greenwich since it is essentially a long-distance operation under a separate Connecticut tariff.

In addition, evidence shows that Morgan substantially integrated the White Plains facility by (1) advertising that Morgan was the successor to Evans (A. 56), (2) supplying the White Plains facility with Morgan equipment (A. 27, 66).

While the day-to-day operations of each branch are supervised by branch managers, evidence established that their functions are strictly limited to overseeing the "physical well-being of their plants," (A. 31), i.e., that the premises are maintained and that the customers have access to their goods in storage (A. 32), and contracting some local sales (A. 64). This responsibility consists of some household moving estimates in their area and answering the branch telephone as "Morgan Brother" (A. 55). "That would be the extent of their sales operation" (A. 64). The branch managers have no responsibility for accounting, bookkeeping, and payroll (A. 31).

The evidence is clear and undisputed that the branch managers have absolutely no authority with respect to policy decisions on the administrative aspects of their facilities. All such decisions are made by the central administrative offices (A. 31).

There is absolutely no evidence that the branch manager or the dispatcher exercise any discretion with respect to the selection or deployment of the day-to-day work force (A. 75). The

dispatcher at each location makes the decision to put on employees according to the day's work load as set by the central office not by the branch manager. The dispatcher merely determines which particular truck and crew goes to which job location (A. 73-76). The employees are assigned in order of seniority on the Company seniority list. The dispatcher has no discretion as to these assignments since the seniority list and the number of men required for any particular job is established pursuant to the collective bargaining agreement between Morgan and Local 814. Mr. Morgan's testimony is replete with evidence that there is one basic company seniority list (A. 33, 34, 57, 64) and not separate lists at each facility as the Board found (Board brief, p. 6). Contrary to the Board's finding that "the dispatcher may hire additional employees", there was evidence indicating that the dispatcher has no real hiring authority since he is severely restricted to those rare occasions when the list is exhausted. No testimony was offered as to any specific instances of the exercise of this discretion. To the contrary, Morgan testified:

"I must say there is an extremely rare occasion because we have so many men available on our seniority list" (A. 34).

In sum, since substantial evidence supports a finding that local autonomy is minimal and separate supervision is merely ministerial, the Board's contrary findings are erroneous. Thus, the Board's refusal to accord controlling weight to Morgan's centralized operations is arbitrary and capricious.

3. The Centralization of Labor Relations

(a) Legal Precedent

Centralized control of labor relations is normally accorded great weight toward finding an accretion to a larger bargaining unit. Lane Drug Co., 160 NLRB 1147 (1966); Meijer Supermarkets Inc., 142 NLRB 513 (1963); Home Exterminating Co., 160 NLRB 1480 (1966); NLRB v. Baton Rouge Waterworks, supra.

Moreover, centralized control of labor relations policies is deemed so critical that this finding will outweigh a finding of day-to-day local supervision where there is little autonomy and virtually no discretion in any significant aspect of labor relations. NLRB v. Purity Food Stores Inc., supra; see Texlite Inc., 1960 CCH NLRB ¶9025; The Great Atlantic & Pacific Tea Co., supra, at 1022; Hudson Pulp and Paper Co., Tissue Division, supra.

(b) The Board's Erroneous Findings and Conclusions

The Board recognized that the evidence of centralized control of all labor relations could not be disputed (Board brief, p. 6, 11).

However, the Board discounted this overwhelming evidence, giving weight to findings of fact unsupported by the evidence.

President Morgan's uncontroverted testimony indicates much more absolute control over labor relations than the Board found. Mr. Morgan exercises absolute control over the Company's labor relations to the extent that no other managerial personnel has any authority concerning employee relations (A. 56, 72, 73). Mr. Morgan alone does all the permanent hiring, disciplining suspending, long-term lay-offs and discharging of all the employees throughout the Morgan operation (A. 32, 57).

Accordingly, the manager of the Morgan facilities have no authority in these areas. They do no hiring (A. 32) firing, disciplining, lay-offs, suspension, promotions, transfers, or wage determination (A. 56, 57, 72, 73). In addition, they make no recommendations to Mr. Morgan with respect to these matters (A. 73). Contrary to the Board's finding, their day-to-day functions do not include ultimate resolution of employees' grievances, all of which are resolved by Mr. Morgan (A. 33).

There was substantial testimony on their complete lack of discretion and authority over labor relations:

"Q. What authority, if any, does the White Plains manager or dispatcher have with respect to the labor relations of your company...?"

Mr. Morgan: None, my instructions are the only question they are able to answer to a delegate is where is the men's room. All others come to me."
(A. 56)

Q. Does the local manager in any of these various locations have any less disciplinary authority, can they impose certain discipline on employees?

Mr. Morgan: No, no one in my company and I think this is true in most companies, discipline is an exception and I manage by exception".
(A. 72).

In sum, the Board's finding of "sufficient local autonomy" with respect to labor relations is completely without foundation; thus its conclusion as to this factor is erroneous.

4. Frequent Interchange of Employees

(a) Legal Precedent

The one factor most commonly relied on by the Board in finding accretion is the frequency of interchange and transfer of employees from one facility or unit to the unit urging accretion. See e.g., The Singer Company, 198 NLRB 870 (1972); Lane Drug Co., supra; Meijer Supermarkets, Inc., supra; Home Exterminating Co., supra. Where interchange is a missing element, no accretion is permitted, see e.g., NLRB v. Sunset House, supra; NLRB v. Food Employees Council, Inc., supra; Hershey Foods Corp., supra; Penn Traffic Co., 219 NLRB No. 35 (1975).

(b) Board's Erroneous Findings and Conclusions

In the instant case, the Board found "some interchange of employees on a Company-wide basis" (Board brief, p. 11), acknowledging only that "The White Plains facility supplies an average of 11 man-days of work per week to the other Westchester County facilities; in turn they provide an average of two-man days each to White Plains" (Board brief, p. 7).

Evidence supports a finding that there is substantial, frequent and common interchange of Morgan's employees from one facility to another. Uncontradicted testimony established that there is a "good deal" of interchange based upon a 25-week study substantiating that assertion (A. 23).

Evidence further established the complete functional interaction between the White Plains operation and the other 814-represented branches as follows:

(a) The White Plains employees are now doing work which formerly would have been done by the Manhattan employees (A. 58). Mr. Morgan testified to specific examples in which White Plains trucks and employees were used interchangeably with, in addition to, or instead of the Manhattan trucks for a move from Pleasantville (Westchester) to New York City and moves in the area of Bronx, Yonkers, and Bronxville (A. 58).

(b) A "good deal" of work which is booked out of the Manhattan offices is performed by White Plains employees (A. 59).

(c) Conversely, work which is booked out of a Westchester facility is also performed by New York employees (A. 59).

(d) Work which the company undertakes often involves "an amalgamation of employees from the various Manhattan Westchester locations including White Plains" (A. 60-61).

(e) White Plains employees work under the supervision of Morgan managers at other locations while performing work outside the White Plains facility (A. 68, 71).

In response to the question whether the interchange varies with the season, Mr. Morgan testified that the percentage of interchange was greatest during the summer (A. 24). There was no other testimony to support a finding that the interchange was "temporary" or "infrequent". To the contrary, Mr. Morgan testified:

"It is quite common for us, if we load a truck in New York City today and it is to be delivered geographically close to the White Plains operation tomorrow, only a driver and helper will leave New York and they will pick up any additional help they need from the White Plains operation.

The opposite is true. If they come into New York they bring in a driver and helper and the balance of the men would be from the geographically closest location". (A.34). (emphasis added)

In light of this testimony, the weight accorded to the factor of employee interchange is erroneous.

5. Geographic Proximity and Shared Community of Interests

(a) Legal Precedent

Where, as here, the employer has multiple centrally controlled locations, and a history of multi-location collective bargaining, the physical separation of the employer's plants is not deemed a controlling factor. Retail stores with locations

throughout a particular circumscribed geographic area, statewide or citywide, are classic examples of appropriate multi-location bargaining units. See e.g., Robert Hall Clothes, Inc., 118 NLRB 1096, 1098 (1957); Meijer's Supermarkets Inc., supra; Home Exterminating Co., supra; The Great Atlantic & Pacific Tea Co., supra.

Where there is an easy interchange of employees within a given geographic radius and shared community of interests with those in the larger unit, Westinghouse Electric Corp. v. NLRB, supra, 440 F.2d at 10-11, physical separation is no barrier to finding an accretion, see e.g., Hudson Pulp and Paper Corp., Tissue Division, supra; Saco-Lowell Shops, 107 NLRB 590 (1953); Borg-Warner Corporation, 113 NLRB 152, enf'd sub nom, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. NLRB, 231 F.2d 237 (7th Cir. 1956), cert. den., 352 U.S. 908 (1956); also see, NLRB v. Frisch's Big Boy Ill-Mar, Inc., supra, 376 F.2d at 501; compare, NLRB v. Sunset House, supra, 415 F.2d at 549; NLRB v. Baton Rouge Waterworks, supra, 417 F.2d at 1067. A shared community of interests exists whenever the employees in both units possess the same skills and perform the same functions under the same job classifications, receive the same wages and fringe benefits under the same labor relations management, within a common geographical area. NLRB v. Sunset House, supra, 415 F.2d at 549.

(b) Board's Erroneous Findings and Conclusions

The Board erroneously relied on a finding that the White Plains facility is "geographically distinct from the Local 814 unit", (Board brief, p. 11). Such a finding is not decisive under established accretion criteria.

There was substantial evidence of common interchange from one facility to another determined by the geographic location of the particular jobs contracted for between Morgan and its customers (A. 58-60). There can be little doubt that the White Plains employees have a shared community of interests with the Local 814-represented employees and can participate readily in union activities within the metropolitan New York area. Under these circumstances, the Board should have concluded that actual physical separation is not determinative. The Board's failure to do so is clearly erroneous.

POINT II

THE BOARD ERRED IN REFUSING TO
DEFER TO THE ARBITRATION AWARD
UNDER THE PARTICULAR CIRCUMSTANCES
OF THIS CASE.

While it is recognized that the Board generally does not defer to arbitration awards in cases concerning unit determinations, NLRB v. Horn & Hardart, supra, 439 F.2d at 678, nonetheless it is the union's position that since the unique combination of facts in the instant case militate in favor of deferral, the Board's refusal to defer was a further abuse of discretion.

The Board has established deferral standards for arbitration awards, Spielberg Manufacturing Co., 112 NLRB 1080 (1955); Collyer Insulated Wire, 192 NLRB 837 (1971); Monsanto Chemical Co., 130 NLRB 1097 (1961); Arbitration awards will be honored where proceedings appear to have been fair and regular, all parties have agreed to be bound, the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act, and where the issues before the Arbitrator were identical to those before the Board. See also, Ford Motor Company, 131 NLRB 1462 (1961); Star Expansion Industries Corp., 164 NLRB 563 (1971); Raytheon Co., 140 NLRB 883 (1963); Ramsey v. NLRB, 327 F.2d 184 (7th Cir. 1964), cert. den. 377 U.S. 1003 (1964); Hawkins v. NLRB, 358 F.2d 281 (7th Cir. 1966); Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274, 280 (8th Cir. 1968).

Accretions have been held to be a proper subject for arbitration, International Union of Operating Engineers, Local 279 v. Sid Richardson Carbon Co., 471 F.2d 1175 (5th Cir. 1973);

Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964); Boire v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 479 F.2d 778, 794 (5th Cir. 1973). Arbitration awards in accretion questions and in representation matters have been enforced by the courts, see e.g., Teamster Local Unions v. Braswell Motor Freight Lines, Inc., 392 F.2d 1, on rehearing, 395 F.2d 655 (5th Cir. 1968); International Brotherhood of Firemen and Oilers v. International Association of Machinists, 338 F.2d 176 (5th Cir. 1964); see also Carey v. Westinghouse Electric Corp., supra.

Under the principles established in Spielberg and Collyer, the Board may defer to an arbitrator's accretion award in a proper case. Champlin Petroleum Co., 201 NLRB 83, 90 (1973); Raley's Inc., 143 NLRB 256 (1963).

Moreover, where, the accretion clause in the contract is clear and the arbitrator's interpretation is consonant with Board accretion standards, the accretion clause has been held controlling, NLRB v. Appleton Electric Co., supra. Also see, Retail Clerks International Association Local No. 455 v. NLRB, 510 F.2d 802, 805-806 (D.C. Cir. 1975).

The Board has recognized that an arbitration award consistent with its accretion standards should be honored under Spielberg principles. Champlin Petroleum, supra, 201 NLRB at 89;

see Westinghouse Electric Corp., 162 NLRB 768 (1967). Applying these principles to the facts in this case, it becomes clear that this is a proper case for deferral.

It was undisputed that the arbitration award of the Moving and Storage Joint Labor Management Board was made after a full and independent hearing. All parties appeared and presented evidence directly relating to the accretion issue necessarily raised under Paragraph 51(a) of the collective-bargaining agreement. The arbitration award clearly states that it is based, inter alia, upon the contract clause and a full consideration of all the facts pertaining to accretion contained in Local 814's letter to Morgan dated June 7, 1974.*

In addition, the arbitration award confirmed the intraunion jurisdictional dispute resolution between Locals 445 and 814 pursuant to the Constitution of the parent International, incorporating it by reference into the award. The employer had agreed in writing to be bound by this jurisdictional dispute resolution. Local 445 had not disputed the intra-union Joint

*The facts as stated in that letter have been admitted as true by Mr. Morgan (A. 39-42). As described fully in Point I, supra, each fact admitted therein has been deemed controlling by the Board in weighing relevant factors in accretion cases.

Council decision and in fact expressly had agreed to an orderly transfer of jurisdictional rights.

Thus, the final and binding arbitration award resolved the identical issue presented to the Board through the interpretation of the accretion clause in the Morgan - Local 814 contract.

Accordingly, not to defer to the arbitration award here does violence to the competing labor policy embodied in the Act, i.e., achieving stability in labor relations through honoring bargaining relationships. NLRB v. Appleton Electric Co., supra; Retail Clerks International Association Local No. 445 v. NLRB, supra, 510 F.2d at 806.

POINT III

THE BOARD'S REIMBURSEMENT ORDER SHOULD
BE VACATED IF THE CEASE AND DESIST
ORDER IS ENFORCED.

"The validity of reimbursement orders necessarily depends on the peculiar circumstances of each particular case".
NLRB v. Adhesive Products Corp., 258 F.2d 403, 409 (2nd Cir. 1958).

This Circuit has held that reimbursement orders in accretion cases should be eliminated where the respondents acted in good faith and there is no evidence that the unfair labor practices actually coerced the employees into joining respondent union rather than some other union. NLRB v. Masters-Lake Success, supra, 287 F.2d at 36; see also, Morrison-Knudson Co. v. NLRB, 275 F.2d 914, 918 (2nd Cir. 1960); Building Material Teamsters, Local 282, IBT v. NLRB, 275 F. 2d 909 (2nd Cir. 1960).
Accord: Intalco Aluminum Corp. v. NLRB, 417 F.2d 36, 41-43 (9th Cir. 1969).

There is not a scintilla of evidence in the record to indicate actual coercion by Local 814 or subjective feelings of coercion on the part of White Plains employees. Contrary to the Board's findings, evidence supports the fact that the Union only proceeded peacefully and in accordance with a valid contract, including its standard union-security provision, after and in accordance with the jurisdictional dispute resolution by Teamster

Joint Council No. 16 in favor of Local 814.

Where, as here, it is also uncontroverted that the White Plains employees as represented by Local 814 have received benefits at least equal to the favorable terms and conditions of employment they enjoyed while employed by Evans, including pension and welfare benefits (A. 12), extra vacation entitlements (A. 61), and union assistance with unemployment matters (A. 61, 62, 64), it is unjust to require Local 814 to refund dues and other moneys which in good faith provided these employees with uninterrupted benefits and favorable representation.*

The reimbursement order "is unduly harsh". NLRB
v. Masters-Lake Success, supra.

Accordingly, the reimbursement portion of the Board's order (A. 100) should be denied if the cease and desist order is enforced.

*These employees had been subject to an identical union-security provision in the Local 445 contract before the acquisition.

CONCLUSION

For the foregoing reasons, the Board's application for enforcement should be denied in its entirety. In the event that the Board's order is enforced, that portion of the order requiring reimbursement should be vacated.

Respectfully submitted,

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APPENDIX

Section 7, 29 U.S.C. §157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(b)(1)(A), 29 U.S.C. §158(b)(1)(A):

It shall be an unfair labor practice for a labor organization or its agents -

to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; ...

Section 8(b)(2), 29 U.S.C. §158(b)(2):

to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9(b), 29 U.S.C. §159(b):

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof....

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
NATIONAL LABOR RELATIONS BOARD,
Petitioner,

NO. 76-4138

-against-

LOCAL 814, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS OF AMERICA,

Defendant.
-----X

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3)
copies of respondent's brief in the above-captioned case
have this day been served by first class mail upon petitioner's
counsel at the address indicated below:

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By Rosalind A. Kochman
ROSALIND A. KOCHMAN, ESQ.

Dated: New York, New York
September 24, 1976

NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on

19

Dated,

Yours, etc.,

COHEN, WEISS AND SIMON

Attorneys for

Office and Post Office Address

605 THIRD AVENUE

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To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court. at

on the day of 19
at M.
Dated,

Yours, etc.,

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To

Attorney(s) for

Index No. 76-4138

Year 19 76

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Defendant.

CERTIFICATE OF SERVICE

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is hereby admitted

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